S.B. Criminal Revision Petition No.153/2007.
(Lukman Khan Vs. State of Rajasthan & Another)

DATE OF ORDER : May 28th, 2007

HON'BLE MR. GOPAL KRISHAN VYAS, J.

Mr. Vishal Sharma for the petitioner.
Mr. Ravindra Acharya for the non-petitioner No.2.
Mr. Ashok Upadhyay, P.P.

In this revision petition the petitioner is challenging the order dated 23.01.2006 passed by the learned Special Judge, SC/ST (Prevention of Atrocities) Cases, Merta in Criminal Misc. Case No.102/2005 (Sessions Case No.81/2005) whereby the learned Spl. Judge has rejected the application filed by the petitioner under Section 49 of the Juvenile Justice (Care & Protection of Children) Act, 2000 and prayed for allowing the same.

The facts of the case, inter alia, are that a report was filed before the Police Station Padukalan (Distt. Nagaur) by Bhinya Ram s/o Prabhu Ram on 15.08.2005 in which it was alleged that his grand-daughter Sushila, aged about 11 years went to watch

the agricultural field but when the complainant reached the field at about 2.30 P.M. he did not find Sushila in the field and, after search, she was found sleeping under a babool tree in the field of one Bala Ram. It was alleged that when she saw the complainant she started weeping and said that their neighbour Lukman took her by force and gagged her mouth with a cloth and, thereafter, Lukman took her to Devalinadi angore and committed rape upon her. It is also stated by her that her clothes are stained with blood and, at that time, when Lukman was committing rape Santosh came at the spot whereupon accused Lukman ran away.

Upon this FIR, case was registered for offences under Sections 376, 336A, I.P.C. read with Section 3(1)(xii), SC/ST (Prevention of Atrocities) Act. After investigation, the police filed charge-sheet against the petitioner. Thereafter, the case was committed to the learned Special Judge for trial.

According to the petitioner he filed an application under Section 49 of the Juvenile Justice Act, 2000 for determination of his age with averments that he was less than 18 years of age on the date of the alleged incident. Alongwith the application, the petitioner submitted that his date of birth is 30th June, 1988 but the police while treating him to be 19 and a half years old filed

the challan which is totally erroneous and illegal. He prayed that he may be treated juvenile on the basis of his date of birth and may be tried by the Principal Magistrate, Juvenile Justice Board, Ajmer. Upon the application filed by the petitioner, an enquiry was conducted by the trial Court. Reply to the application was filed by the complainant and, thereafter, evidence was recorded by the trial Court for determination of his age.

From the side of the petitioner, three witnesses viz., A.W.-1 Dayal Ram, A.W.-2 Poona Ram and A.W.-3 Bhanwaroo Khan were examined and from the side of the complainant statement of N.A.W.-1 Satveer Singh was recorded. In the reply filed by the complainant, it was specifically mentioned that at the time of arrest the petitioner himself informed the investigating officer that his age is 19 years and, during investigation, the investigating officer took ration-card and voter-list of the Panchayat Samiti Riyanbari, village Arniyala for the year 2004 in which the age of the petitioner was shown as 18 years. Therefore, it is prayed by the complainant that if in these documents the age of the petitioner is more than 18 years found at the time the occurrence took place then obviously the petitioner cannot be treated to be a juvenile. Alongwith the application, the petitioner filed a transfer-certificate dated

24.09.2005 by Head Master, Government Upper Primary School Arniyala in which the date of birth of the petitioner is mentioned as 30.06.1988. During enquiry of age some more documents of educational institution were filed. Accordingly, it was submitted before the trial Court by the petitioner that on the date of the alleged occurrence i.e., 15.08.2005 he was only6 17 years 1 month and 15 days old and he was minor and as per the provisions of the Juvenile Justice Act he was less than 18 years of age and his trial should be conducted by the Juvenile Justice Board, Ajmer.

After recoding the evidence as aforesaid the learned trial court rejected the application filed by the petitioner holding that the petitioner has not proved before the court by evidence that he was less than 18 years of age on the date of occurrence. The trial court held that as per documentary evidence filed by non-petitioners, accused-petitioner was 19 and 1/2 years old on the date of the occurrence.

Learned counsel for the petitioner vehemently argued that the educational documents filed by the petitioner were supported by the oral evidence of the present Head Master of the School, therefore, the trial court has committed error while dismissing the statement of Head Master AW-2 Poona Ram. It is contended that in the statement AW-2 Poona Ram has categorically stated that as per official record the date of birth of the petitioner is

30.06.1988. Learned counsel for the petitioner also submitted that as per statement of AW-1 Dayala Ram then Head Master of Government Primary School in which he has proved by his evidence that as per School record the date of birth of petitioner Lukman is 30.06.1988.

Relying upon the statement of AW-3 Bhanwaroo Khan, father of the petitioner, learned counsel for the petitioner contended that he has categorically stated before the Court that his son is 17 years of age. Learned counsel for the petitioner invited attention of the Court towards various judgments of Hon'ble Supreme Court as well as High Courts. Relying upon the judgment of the Supreme Court in Pratap Singh Vs. State of Jharkhand & Another, **2005 Cri. L.J. 3091**, it is contended by learned counsel for the petitioner that the constitutional Bench of the Supreme Court held that for determination of the age of the accused, the reckoning date is the date of the alleged incident to be taken into account and not the date of filing challan. He further relied upon judgments of this Court reported in **2005 (6) RDD 1965 (Raj), Bajrang @ Brijlal Vs. State of Rajasthan and 2006 (3) RDD 1371 (Raj), Jawari Lal Bhati Vs. State of Rajasthan.** Learned counsel for the petitioner further relied upon the judgment of this Court reported in **2006(2) CJ (Raj.)**

Cr. 811, Mallaram Vs. State of Rajasthan. Referring to these judgments, it is contended by learned counsel for the petitioner that the trial Court has committed error in holding that the petitioner was not less than 18 years of age on the date of the incident.

On the other hand, learned counsel for the non-petitioner vehemently argued that the purpose of the inquiry is to adjudicate and determine the age of the accused on the date of the incident. Similarly it is the duty of the applicant to prove before the court by oral as well as documentary evidence that on the date of the incident his age was less than 18 years. Learned counsel for the non-petitioner invited my attention towards the voter list for the year 2004 in which the age of the petitioner has been shown as 18 years and the arrest-memo Ex.-A/1 in which the petitioner himself stated before the investigating officer that he is 19 years of age. Learned counsel for the non-petitioner complainant contended that in the medical-report issued by the competent doctor Mahesh Mathur, Ex.-A/2 the age of the petitioner is shown to be 19 years and, upon examination, it is observed by the doctor as on 24.08.2005:

> "On general physical examination of Mr. Lukman Khan aged 19 years, it was seen :

(a) the person is well-built with normal growth.
(b) Secondary sexual characters are well – developed.
(c) Size/growth of genitalia is normal."

It is also argued by learned counsel for the non-petitioner complainant that as per the statement of the father of the petitioner it has been stated by him in the cross-examination that age of Lukman in the voter-list was written at his instance. It is also stated by him that at the time of admitting Lukman in school though he signed the form but the form was not filled in by him. It is also admitted by witness Bhanwaroo Khan, A.W.-3, father of the petitioner, there is ration-card issued in favour of his family which was prepared on 10.09.1997 in which age of Lukman was shown as 15 years; meaning thereby, that though in the educational document produced by the petitioner the date of birth of the petitioner is shown as 30.06.1988; but, in fact, it is not proved by even his father A.W.-3 Bhanwaroo Khan who has categorically stated in his cross-examination that the school form was not filled in by him and he only put his signature thereon. Learned counsel for the non-petitioner complainant vehemently contended that A.W.-3 Bhanwaroo Khan admitted that age of his son Lukman (petitioner) in the voter-list was mentioned at his information and in his statement he has further testified to the evidence of the date of birth of the petitioner

mentioned in the ration-card of the family to be entered at his instruction.

Learned counsel for the non-petitioner also invited attention of the Court towards the statement of Satveer Singh, N.A.W.-1, C.O., Merta City, who has categorically stated that at the time of arrest of accused Lukman the accused informed him his age to be 19 years. It is further contended by learned counsel for the non-petitioner that in his statement the investigating officer admitted that he took in his possession the ration-card of the family and also procured the voter-list. Therefore, as per counsel of the non-petitioner, it is obvious that the accused petitioner was more than 18 years of age on the date of commission of the offence.

I have carefully perused the entire record of the case.

It is settled principle in law that in the present context the age of the accused for the purpose of his trial is his age as on the date of the incident. Therefore, the only question in this case is whether the petitioner is able to prove before the Court by oral as well as documentary evidence that he was less than 18 years of age on the date of the incident. In the case on hand, save for the educational certificates produced by the petitioner, rest of the evidence coming on record before the Court plainly

shows that the accused petitioner was more than 18 years of age on the date of the incident. So far as the educational document produced by the petitioner is concerned, his date of birth is mentioned therein as 30.06.1988 and to prove the document before the Court the petitioner led evidence of A.W.-1 Dayalram, present Head Master of Government Primary School, Kheda Kishanpura. However, in his cross-examination, the witness only proved his inability to attest the veracity of the document produced by the petitioner with regard to his date of birth though, of course, A.W.-1 Dayalram admitted the facts of school record wherein the date of birth of the accused petitioner was entered as 30.06.1988. However, A.W.-3 Bhanwaroo Khan, father of the petitioner, admitted in his cross-examination that he had only put his signature on the admission form and he had not filled in it. A.W.-3 Bhanwaroo Khan further admitted in his cross-examination that, "मेरे अन्य बच्चों की उम्र मैंने वोटर लिस्ट में नहीं लिखवाई लेकिन लुकमान की उम्र मैंने वोटर लिस्ट में लिखवाई थी। वोटर लिस्ट में लुकमान की उम्र 18 वर्ष व उस्मान की उम्र 20 साल लिखी हुई है।" This witness also admitted the ration-card of the family though he said that age is mentioned by conjecture.

In **Mallaram Vs. State**, this Court placed reliance upon the judgment of the Supreme Court in Arnit Das Vs. State of

Bihar, 2000 (5) SCC 488 wherein on review of judicial opinion, the Supreme Court held that while dealing with the question of determination of the age of the accused for the purpose of dinging out whether he is a juvenile or not, a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. Accordingly, this Court in Mallaram's case held that the Court below fell in error in not declaring the petitioner juvenile on the relevant date of occurrence on the basis of the medical evidence taking variance on the higher side and on the voter-list and form for identification-card which, in the opinion of the Court, were not proved in accordance with law.

Similarly, in the case of **Jawari Lal Bhati Vs. State of Rajasthan** (supra), with regard to determination of the age of the accused, this Court considered the probative value of the evidence and held as under :

> "Thus, in determination of the age of the accused, the Court need apply its mind only to the probative value of the evidence. A school certificate or document showing the date of birth of the accused, in criminal justice, need not be put to test on the anvil of technical certainties. By sure, such

> approach would lead astray the conclusion of the Court whereas it is settled view that benefit of admissible variation taken into account over a ossification or medical test for determination of age goes in favour of the accused."

But, in the present case, it is to be seen whether by the evidence it is proved that the petitioner was less than 18 years of age on the date of the occurrence and on the basis of the educational document – transfer certificates and school admission form, the petitioner can be treated to be juvenile.

In this case, two important documents which are voter-list for the year 2004 and ration-card of the family of the accused were produced before the Court by the non-petitioner and, so also, by the investigating officer at the time of filing challan. The father of the petitioner, Bhanwaroo Khan, A.W.-3, in his cross-examination, admitted that in both these documents age of petitioner Lukman was mentioned at his instance. It is not disputed by A.W.-3 Bhanwaroo Khan that these documents are genuine documents. Likewise, at the time of arrest, in the arrest-memo, the petitioner himself disclosed his age as 19 years on the date of the occurrence. Before the medical examination also, the petitioner gave out his age as 19 years to the doctors; and, as per physical condition of the petitioner reported as a result of the examination by the doctors, it is obvious that the

petitioner's age was 19 years at the time of the occurrence.

Similarly, the petitioner's father himself has not disputed the age of the petitioner mentioned in the voter-list for the year 2004 and ration-card for the year 1997. Upon careful examination of the statements recorded by the trial Court, it is obvious that the documents produced by the non-petitioner were proved by the evidence of the father of the petitioner, A.W.-3 Bhanwaroo Khan also.

Though the admission form is said to be submitted by the father of the petitioner in the school but in his statement A.W.-3 Bhanwaroo Khan accepted that the said form was not filled in by him and he only put his signature upon it. Therefore, it cannot be said that the date which is recorded in the educational institution is proved by the evidence of the petitioner's father, A.W.-3 Bhanwaroo Khan because there is categorical deposition made by the witness in his cross-examination that, -

> "यह सही है कि प्रवेश फार्म मैंने नहीं भरे थे बल्कि किसी दूसरे से भरवाये थे। मैंने सिर्फ हस्ताक्षर किये थे।"

It is also strange that in his entire statement it is nowhere stated by him expressly or impliedly that his son Lukman was born in the year 1988. Rather, it is categorically stated by him in his cross-examination that "उस्मान व लुकमान किस साल में जन्मे, मुझे याद नहीं है।"

In these circumstances, when the documents produced by the non-petitioner were proved by the evidence of the father of the petitioner and, further, in his statement, father of the petitioner A.W.-3 Bhanwaroo Khan admitted that the school form was not filled in by him and, so also, he has not mentioned the date of birth of the petitioner in his statement before the Court and rather gave statement before the Court that he did not remember in which year Lukman was born, then, it is clear that petitioner failed to prove his date of birth before the Court as pleaded by him to be 30.06.1988. It may also be observed here that in the facts and circumstances of the case, when evidence is there on record to prove the contrary, the petitioner cannot be given benefit of a borderline case inasmuch as in the present case documentary and oral evidence is fortified by medical opinion expressed by the doctors upon examination of the petitioner. From the evidence on record, it cannot be said that two views are possible in the present case because A.W.-3 Bhanwaroo Khan, father of the petitioner has not proved the date of birth recorded in the educational institution and categorically stated that he had only put his signature on the admission form and had not filled in the form nor did he say that

date of birth of the petitioner was given out by him to be filled in.

In the aforesaid facts and circumstances, the order passed by the trial Court rejecting the application of the petitioner for treating him as juvenile does not suffer from any infirmity and no interference is called for.

The revision petition is dismissed.

(Gopal Krishan Vyas) J.